79-1559

Supreme Court, U. S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

_____TERM, 1980

No. A-618

RONALD HOWARD BRAMBLETT, *Petitioner,*

V.

TENNESSEE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

INDEX

	Page
Opinion, Allen R. Cornelius, Jr., dated September 4, 1979	2
Judgment, Tennessee Court of Criminal Appeals No. 136	10
Judgment, Tennessee Supreme Court, Denying Appeal	12
Notice of Petition for Writ of Certiorari to the Supreme Court of the United States from a Judgment of the Supreme Court of Tennessee	13
Stay Order issued pending filing of Writ of Certiorari to The United States Supreme Court Filed November 21, 1979	15

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
JUNE 1979

Ronald Howard Bramblett	)	
	)	
Appellant	)	NO. 136
	)	
v.	)	BRADLEY COUNTY
	)	
STATE OF TENNESSEE	)	Honorable Earle G. Murphy,
	)	Judge
Appellee	)	(First Degree Burglary with a
	)	Firearm)

FOR THE APPELLANT

William H. Ortwein
Suite 202
620 Lindsay Street
Chattanooga, Tennessee

Carole Wiggins
Suite 202
620 Lindsay Street
Chattanooga, Tennessee

FOR THE APPELLEE

William M. Leech, Jr.
Attorney General
450 James Robertson Parkway
Nashville, Tennessee

John Zimmermann
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee

Richard A. Fisher
District Attorney General
P. O. Box 1351
Cleveland, Tennessee

OPINION FILED: Sept. 4, 1979

AFFIRMED
Allen R. Cornelius, Jr.
Judge

OPINION

On his second trial, appellant was convicted in Bradley County of first degree burglary, with a firearm, and sentenced to not less than ten years nor more than fifteen years in the penitentiary. He is before this court assigning three errors in the court below. These errors are as follows:

1. The court erred in overruling his objection to the State's closing argument.

2. The court erred in overruling the defendant's motion for a mistrial based on the State's closing argument.

3. The court erred by not giving a curative instruction to the jury after instructing them to disregard statements made by the District Attorney General in his closing argument.

In view of the nature of these alleged errors we will review the proof, the closing argument and the trial court's reaction thereto as reflected by the bill of exceptions.

James Stewart testified for the State that Friday, October 14, 1977, he lived at 2865 Campbell Bridge Road, in Bradley County. He arrived home in the early morning and found a man stepping out backwards from his bedroom window. He grabbed the person and claims he got a "real good look at him because of the street light...". They scuffled and Stewart fell at which time the man ran. Stewart then pursued him. The man pulled a gun and threatened to kill Stewart, who then hit the ground. The next day, Stewart identified appellant at a photographic line-up, consisting of nine photographs. All but appellant's picture were black and white and had height markings in the background. Appellant's picture was the only color photograph in the display.

John Welch, a police officer at the time of this event lived a block and a half away. He was at home on the afternoon of October 13 washing his automobile. He testified he knew appellant through the appellant's working at the Bradley County Ambulance Service and that the appellant passed his residence two or three times on the afternoon of October 13, 1977. He was driving a red car with a white stripe. Welch testified appellant was wearing a dark toboggan.

A Sherry Phillips, the girlfriend of Stewart's roommate, was visiting in the apartment during the day and had stayed alone some thirty minutes after her boyfriend had gone to work. She had locked her keys in her car. While trying to get a key from behind the license plate, a man "pulled up" and offered to help. They then had a conversation about why she was there with no one to help her and about her going back to college. The man gave his name as Ronnie Bramblett. He was driving a red or maroon car with a white stripe and was wearing a dark toboggan. She viewed the photographic display referred to before and identified appellant.

David Tinsley, a police officer at the time, testified he received a description of the man from Stewart at the crime scene. The man was average height and stocky build, and had on a green jacket, dark pants, and a toboggan. He found Stewart's bedroom ransacked. Nothing was reported missing from the apartment. On Saturday he conducted the photographic display [line-up], first for Miss Phillips and later for Stewart.

Appellant's wife testified that on October 13, 1977, she went to work in their red Buick car and appellant used their van. She got home around four-thirty p.m. Her husband came in about seven and they went in the van to the home of Jim and Charlene Shadden, in Chattanooga, where they visited until about one o'clock in the morning. She and her husband, the appellant, having been together all evening, went straight home together and spent the remainder of the night there.

Mr. Jim Shadden, a twenty-six year employee of Combustion Engineering, testified he was certain about appellant and his wife being at his home in Chattanooga on Friday night and that he had seen them at least three nights that week. He said that they usually would come around seven or eight and stay till about one or two in the morning. His wife testified the appellant and his wife had been at the Shadden's home near Chattanooga specifically on Friday night October 14th, and had been there three or four nights that

week, leaving, "after the T.V. went off about one or two." She was unable as was her husband, to specify the nights except Friday.

Appellant's father testified he lives and works in Dalton, Georgia, and that on Thursday and Friday his son ate dinner with him between twelve and one. His son was in Dalton to get some carpet and was getting everything squared away for the trip they took on Saturday to the Smokies for his daughter-in-law's birthday. The appellant was driving his van.

Sammy Sadler testified he worked for Chevron at Ooltewah during October and recalled "jumping off" appellant's van. They brought the van back to the station because the belt was off the alternator. He identified the work order dated October 13, 1977 showing the work.

Kenneth Bailey testified that during October 1977 he was employed with Parker Brothers Carpet of Dalton, that appellant was there on or about October 13, 1977 to pick up some carpet but it had not arrived. He remembered that appellant was "pretty upset". He recalls that it was the Thursday before appellant's wife's birthday the following Saturday. Appellant had arrived close to lunch-time and "aggravated me most of the evening" and that appellant was there until closing, which was at about dark. Apellant was driving a van on this day. Bailey testified appellant came back the next day and failed to get the carpet that day.

Appellant's testimony was substantially the same as that of his witnesses. He denied the facts as related by the State's witnesses and particularly denied that he had met James Stewart or Sherry Phillips prior to a hearing on these charges.

For proper context, we will consider the opening remarks of the District Attorney in his argument in chief, then the portions of his argument to which appellant complains. These remarks are as follows:

GENERAL FISHER: Ladies and Gentlemen, the Judge has told you that this is the closing argument aspect and all of you but one or maybe two of you have suffered through closing arguments in the past. We will try to be brief and call certain things to your attention, speaking on behalf of the State of Tennessee that in my opinion support the charge or the indictment by the grand jury. Did Ronald Howard Bramblett commit burglary in Bradley County, did he set it up, did he case the place, did he ascertain in a very casual, almost professional manner, that no one was going to be there that evening, and did he come back later and enter into the residence with the intent to steal? I submit to you that he did based upon the proof you have heard, and based upon not just the proof but the corroboration of the proof. (B.E. p. 98, 12-25)

Ronald Bramblett, you see wasn't sure, wasn't absolutely sure when he decided to commit this burglary whether he would catch Mr. Stewart, the man who was working on the railroad, his wife, his girlfriend, his children, or some other person in that house or get caught that night, and that gun he had was for one purpose, to make certain he didn't get caught. And don't you believe, don't you believe that he would have shot and killed had to got down to it. (B.E. p. 101, 24, p. 102, 6)

Now let's look at his defense very briefly, A lot of witnesses through (sic) where he was on Friday night, and some of them Saturday, and some of them Sunday. Witnesses proved where he was some times Thursday. You know, not every criminal looks like a criminal. As a matter of fact, there's not any one picture of a criminal person who involves in burglarious activity especially. Now, he has got some kind of calling. He is some sort of independent salesman. He owns a new car and a relatively new van. I submit to you, ladies and gentlemen, that he is a burglar, that in addition to his main cause he steals for a living and he has used the proceeds of his good to go on through life, the hard earned income of others.

MR. ORTWEIN: Objection, please the Court, and move for a mistrial.

THE COURT: I'm going to overrule the motion, but I'm going to instruct the jury to disregard these statements.

GENERAL FISHER: Which statements, your Honor?

THE COURT: The last one that was made.
(B.E. p. 102, 24-5 to B.E. p. 104, 1-16)

This concluded the State's argument in chief. We do not have before us the argument of appellant's counsel. We next consider the rebuttal argument of the District Attorney and particularly the following comments:

Let's assume that all of this is true, and I submit to you, ladies and gentlemen, he is a burglar, he is guilty of burglary. You know, burglars have normal lives in addition to their unlawful activity. You can assume that. His wife did have a birthday. He did go to lunch with a parent. He certainly did not have the van both days if you believe his wife. You remember she said she had the van Friday. Aren't they scrambling right, left, and sideways to create enough confusion, enough confusion to confuse one of you? Does that look like what they are doing in this defense that they have concocted?

MR. ORTWEIN: Objection.

GENERAL FISHER: Ladies and Gentlemen . . .

THE COURT: Overruled.
(B.E. p. 106, 9-22)

We have got eyewitnesses that tie Ronald Bramblett into a household burglary, a burglary in which he just casually walks

into somebody else's home, armed with a weapon, and begins to search for different things he needs or wants. It could have been anybody's residence. On this occasion we have James Stewart being burglarized by this man, armed and dangerous. Think when you retire to the jury room, and prior to your discussion or as you are listening to me now, what you are going to do the night you come home, or one of your friends or family members comes home, and there's an armed man in there burglarizing your house. Now, if that doesn't justify a verdict of ten to fifteen years - -

MR. ORTWEIN: Objection, please the Court.

GENERAL FISHER: And two to five years - -

MR. ORTWEIN: I move for a mistrial based on that statement. He has appealed to something outside of this trial simply bias prejudice.

THE COURT: The jury will disregard these statements made by the attorney general and I'm going to overrule the motion.

GENERAL FISHER: Ladies and gentlemen, I request a verdict of guilty based upon your consideration as jurors in this case, and upon a finding of guilt, a punishment that you as jurors feel that this type of crime deserves. Thank you.
(B.E. p. 108, 2-25)

The argument of counsel is a valuable privilege that should not be unduly restricted. Courts give wide latitude to counsel in arguing their position in a case to the jury and the action of the trial judge in controlling arguments of counsel will not be reversed absent an abuse of discretion. ***State v. Sutton,*** 562 S.W.2d 820,823. A prosecuting attorney may argue that which is warranted by reasonable inference from evidence abducted at trial. ***State v. Sutton,*** supra.

The test to be applied by the appellate court in reviewing instances of improper conduct, i.e., "whether the improper conduct could have affected the verdict to the prejudice of the defendant." ***Harrington v. State,*** 385 S.W.2d 758. There are some five factors which should be considered in determining whether improper conduct could have affected the verdict to the prejudice of the defendant. ***Judge v. State,*** 539 S.W.2d 340, 344.

Considering the alleged instances of improper argument in the context of the proof and the District Attorney's overall argument in chief, the argument and the Court's reactions to the objections are passable, though they are not examples to be acclaimed.

We must view the objections to the rebuttal argument of the District Attorney in the light of the legal principle that, ". . . the trial judge in controlling arguments of counsel will not be reversed absent an abuse of discretion. ***State v. Sutton,*** supra; ***Sparks v. State,*** 563 S.W.2d 564, 569. Without appellant's counsel's argument in the bill of exceptions, we are unable to take into account whether the improper remarks of the prosecutor were made in response to the defendant's comments or argument. ***Judge v. State,*** supra at 344. Also, see ***French v. State,*** 489 S.W. 2d 57, 60: "Where, as here, the trial judge sustained objection to improper argument and instructs the jury to disregard it, the error will not constitute grounds for reverse."

There is evidence from witness Stewart that the man pulled a gun and threatened to kill him. The verdict of the jury, approved by the trial judge, accredits the State's theory. Where the punishment fixed by the jury is within the limits prescribed by statute for the offense, it cannot be said to be motivated by passion, etc. ***Bennett v. State,*** 530 S.W.2d 788, 793. We have carefully reviewed this record and are convinced the appellant has not shown that he was prejudiced by an abuse of discretion by the trial judge in controlling

the District Attorney's argument as related to guilt or punishment. ***Buchanan v. State***, 454 S.W.2d 178, 182. We affirm the judgement.

/s/ Allen R. Cornelius, Jr., *Judge*

CONCUR:

/s/ Lloyd Tatum, *Judge*
/s/ James C. Beasley, *Special Judge*

STATE OF TENNESSEE
COURT OF CRIMINAL APPEALS, EASTERN DIVISION
at KNOXVILLE

[Filed September 4, 1979]

Ronald Howard Bramblett	)	CCA No. 136 Bradley County
Appellant	)	Offense: First Degree Burglary
vs.	)	with a Firearm
State of Tennessee	)	Affirmed No. 9173
Appellee	)	

JUDGMENT

Came the Appellant, Ronald Howard Bramblett, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Bradley County; and upon consideration thereof this Court is of the opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the Appellant, for his offense of First Degree Burglary with a Firearm be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than Fifteen (15) years, and not less than Ten (10) years, commencing on the day of his reception at said penitentiary.

The sentence of imprisonment will be credited with the time the Appellant spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

It is further ordered by the Court that Appellant be infamous and disqualified from holding any office under this State.

The Appellant will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Bradley County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Bradley County, which will be his authority for delivering the Appellant to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the Appellant files a petition for certiorari in the Tennessee Supreme Court, he may be admitted to bail on bond in the penalty of $20,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for his appearance in the Supreme Court; and in default of such bond he will be remanded to the Sheriff of Bradley County.

Allen R. Cornelius, Jr., J.
Lloyd Tatum, J.
James C. Beasley, Sp. J.

FELONY - Affirmed (Infamous)

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

[Filed October 24, 1979]

State of Tennessee,	)	
Plaintiff-Appellee,	)	
v.	)	Bradley County No. 136
Ronald Howard Bramblett,	)	
Defendant-Appellant.	)	

ORDER

Upon consideration of the application for permission to appeal filed by the appellant and the answer of the appellee, the briefs of counsel and the entire record, the Court is of the opinion that the application should be denied.

Costs will be borne by the appellant.

PER CURIAM

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

Ronald Howard Bramlett	)	
Appellant	)	No. 136
vs.	)	Bradley County
State of Tennessee	)	
Appellee	)	

NOTICE OF PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM A JUDGMENT OF THE SUPREME COURT OF STATE OF TENNESSEE

Notice is hereby given that Ronald Howard Bramblett, the appellant above named, appeals to the United States Supreme Court from the final Order of October 24, 1979, affirming appellant's judgment of conviction entered therein.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257.

Appellant was convicted of the crime of First Degree Burglary with a Firearm, in violation of Tennessee Code Annotated, Section 39-901, and was sentenced to ten to fifteen years in the State Penitentiary, and is presently confined at the State Penitentiary in Nashville, Tennessee.

/s/ Robert H. Crawford
Attorney for Appellant
617 Cherry Street
Chattanooga, Tennessee 37402

CERTIFICATE

I hereby certify that a copy of the foregoing Notice of Petition of Writ of Certiorari to the United States Supreme Court from a Judgment of the Supreme Court of State of Tennessee has been forwarded by United States Mail, with sufficient postage thereon to carry same to its destination, to the following:

William M. Leech, Jr.
Attorney General
450 James Robertson Parkway
Nashville, Tennessee

Richard A. Fisher
District Attorney General
P. O. Box 1351
Cleveland, Tennessee

This 17th day of January, 1980.

/s/ Robert H. Crawford

IN THE CRIMINAL APPEALS COURT OF TENNESSEE
EASTERN DIVISION, AT KNOXVILLE

[Filed November 21, 1979]

Ronald Howard Bramblett	)	No. 136
	)	Bradley County
vs.	)	Charge: First Degree Burglary
State of Tennessee	)	with a Firearm

STAY ORDER

Upon motion of the petitioner-defendant, Ronald Howard Bramblett, he is hereby granted a stay of execution of the judgment of this Court for a period of 90 days from October 24, 1979, pending the filing and disposition of a petition for writ of certiorari in the Supreme Court of the United States, his conviction having been affirmed by the Supreme Court of Tennessee on October 24, 1979, during which time he may remain at liberty provided he executes and files with the Clerk of this Court a good and sufficient bail bond in the sum of $20,000.00, with two solvent personal sureties, or one corporate surety, certified by the Clerk of the trial court and conditioned to assure the appearance of the petitioner-defendant before this Court when ordered so to do.

A copy of the petition for certiorari, certified by counsel and showing the date of its filing in the United States Supreme Court, will be filed promptly with the Clerk of this Court.

At the conclusion of such ninety-day period, however, if the petitioner-defendant has failed to perfect his petition for the writ of certiorari in the United States Supreme Court, the Clerk will notify the Sheriff and the sureites for the petitioner-defendant that the judgment heretofore entered by this Court will be executed forthwith.

The Clerk of this Court will issue a duly certified copy of this order to the Clerk of the Criminal Court of Bradley County, Tennessee, and the Sheriff of Bradley County, Tennessee.

Entered this the 21st day of November, 1979.

/s/ Joe D. Duncan
Judge.

APPROVED:

/s/ Robert H. Crawford
Attorney for Petitioner-Defendant
617 Cherry Street
Chattanooga, Tennessee 37402